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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-1166

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COLUMBIA STEAMSHIP COMPANY, INC.,
*Petitioner*

vs.

AMERICAN MAIL LINE LTD., STATES STEAMSHIP COMPANY, PACIFIC FAR EAST LINE, INC., AMERICAN PRESIDENT LINES, LTD., LYKES BROS. STEAMSHIP CO., INC., AND AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
*Respondents*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals [Pet. A1-A14] is reported at 510 F.2d 29. The opinions of the district court [Pet. A-15-16, A-17-21] are not reported.

### JURISDICTION

The judgment of the court of appeals was entered on January 16, 1975 [Pet. A-2]; its mandate was, how-

ever, not issued until November 18, 1975 [Pet. A-1, A-3]. The petition for writ of certiorari was filed on February 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the petition is timely.

2. Whether petitioner has accepted rulings which eliminate any claim by it for relief.

3. Whether operating-differential subsidy may under the Merchant Marine Act, 1936, be paid in respect of a vessel which carries Government "preference" cargo, reserved in whole or in part for carriage by U.S.-flag vessels.

## STATUTES INVOLVED

The statutes considered by petitioner to be relevant are reprinted in Appendix B to the petition [A-22-33].

## RESTATEMENT OF THE CASE

Each of the six respondent steamship lines receives operating-differential subsidy under the Merchant Marine Act, 1936. Petitioner filed complaint against them demanding treble damages on the theory that their receipt of such subsidy for voyages on which they carried Government preference cargo, reserved in whole or in part for carriage by U.S.-flag vessels, violated the Merchant Marine Act; the complaint asserted that petitioner could recover under (a) §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, (b) § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227, or (c) §§ 15-18 of the Shipping Act, 1916, 46 U.S.C. § 815.

Petitioner sought a protective order against discovery and in connection therewith the parties entered into a

five paragraph stipulation of facts [Pet. A-3-5] designed to permit decision as to whether petitioner could allege any concert of action among respondents sufficient to ground the complaint.

It was for that limited purpose agreed: Respondents receive operating-differential subsidy under the Merchant Marine Act, 1936. All cargo shipped by the Department of Defense and 50% of that shipped by civilian agencies of the Government was reserved to U.S.-flag vessels. A significant part of respondents' cargo was of this preference category.[1] Military cargo was offered on the basis of competitive bids; each respondent when bidding knew that it and the other respondents received operating-differential subsidy. Petitioner was an unsubsidized carrier and, as respondents were aware, was dependent upon Government preference cargo for its economic survival.

Petitioner amended its complaint to eliminate its count under § 1 of the Sherman Act [Pet. A-18]. Chief Judge Solomon ruled that no sufficient concert of action was shown to base a complaint under § 810 of the Merchant Marine Act [Pet. A-15-16].[2] He subsequently held that the Merchant Marine Act, 1936, did not preclude the receipt of operating subsidy for voyages on which some preference cargo was carried, and that neither § 2 of the Sherman Act nor § 16 of the Shipping Act applied, as in this case, to subsidized carriers competing among themselves [Pet. A-19-20].

Petitioner abandoned its Shipping Act count on appeal. The Court of Appeals affirmed, holding: (a) The Merchant Marine Act, 1936, does not prohibit the carri-

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[1] Petitioner implies that the parties stipulated that 60% of the respondents' outbound cargo was preference cargo [Pet. 7]. They did not; the 60% figure was not confined to subsidized carriers [Pet. A-4-5].

[2] This ruling was by opinion of May 5, 1972, and order of June 2, 1972, not September 6, 1972, as shown at Pet. A-15.

age of preference cargo by subsidized vessels [Pet. A-9-10]. (b) § 810 was not violated, since the respondents had no concert of action but were competing for the cargo [Pet. A-10-12]. (c) § 2 of the Sherman Act was for the same reason not violated, and it was too late for petitioner to insist upon developing a factual record after pitching its case in the District Court on the stipulation.

The Court of Appeals took pains to ensure that its decision harmonized with related proceedings before the Maritime Administration and the federal courts in the District of Columbia. In *Carriage of Preference Cargo*, 13 SRR 44 (MSB, 1972), the Maritime Subsidy Board held that the 1936 Act was designed to subsidize vessels which were competitive with foreign-flag vessels and did not require that each lot of cargo be competitive; it went on, however, to hold that for the future subsidy would be reduced, on a sliding-scale, to the extent that more than 50% of freight revenues were derived from preference cargo. The Court of Appeals for the 9th Circuit agreed with the Board but undertook to reexamine its decision if the U.S. Court of Appeals for the District of Columbia Circuit should differ; to that end it directed that its mandate should not issue until the latter court should have decided the issue [Pet. A-3, 7-9]. The U.S. Court of Appeals in the District of Columbia by opinion of September 5, 1975, agreed with the Board and with the 9th Circuit. *States Marine International* v. *Peterson*, 518 F.2d 1070 (1975). The Court of Appeals for the 9th Circuit on November 18, 1975, directed that its mandate issue forthwith, and on December 15, 1975, denied petitioner's motion to recall that mandate.

A petition for writ of certiorari (as well as a protective cross-petition) to the U.S. Court of Appeals for the District of Columbia Circuit was denied on February 23, 1976. *American Maritime Association* v. *Richardson*, No. 75-800.

## ARGUMENT

### A. The Petition is Out of Time

A petition for writ of certiorari to review a civil judgment must be filed "ninety days after the entry of such judgment." 28 U.S.C. § 2101(c). Rule 26, Federal Rules of Appellate Procedure (FRAP), defines that entry of judgment to be the "notion of a judgment in the docket." The Court of Appeals docket notation of this judgment was entered on January 16, 1975.[3] Accordingly, the time for petitioner to seek a writ of certiorari expired on April 16, 1975. The petition was filed almost ten months later, on February 12, 1976. Since the time limitation is statutory, the untimeliness of the petition is a jurisdictional defect, necessitating its denial. *Department of Banking* v. *Pink*, 317 U.S. 264, 266-267 (1942).

The Court of Appeals stay of the issuance of its mandate did not operate to extend the period within which the petition could properly be filed. The statutory event commencing that period is the "entry of judgment," not "issuance of mandate."[4]

Here the Court of Appeals deemed it "the proper course of action" to rule on the merits of the appeal and

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[3] The Clerk's memorandum noting the entry of judgment was on the same day mailed to all parties.

[4] *Comm'r* v. *Estate of Bedford*, 375 U.S. 283, 285-287 (1945), took an "order for mandate" as entry of the judgment because of the consistent understanding of the Second Circuit and its bar, but urged a revision of the unique practice of that Court. The practice could not in any case have survived the 1968 Rules of Federal Appellate Procedure.

FRAP 41(b) makes provision for a stay of mandate pending submission of a petition for certiorari. The Rule makes manifest that certiorari time does not await issuance of mandate before the statutory period commences. If certiorari time commenced only on issuance of mandate, it would run forever after a Rule 41(b) stay.

affirmed the judgment of the District Court, staying the issuance of its mandate until final disposition of the related cases in the D.C. Circuit. [Pet. A-3, 9]. The Court of Appeals thereby rendered a "final" judgment, one that would not change *unless* a specified event were later to occur. The court's latent power subsequently "to reopen or revise its judgment" does not alter the finality of the judgment originally rendered. *Market St. R. Co.* v. *Comm'n*, 324 U.S. 548, 551 (1945).[5]

Petitioner received notice of the date of entry of the judgment, as called for by FRAP 36, and thus suffered no uncertainty as to when the certiorari time commenced to run. *Cf. Scofield* v. *NLRB*, 394 U.S. 423, 427 (1969). To preserve its rights, petitioner could have filed either a petition for rehearing in the Court of Appeals, or a timely petition for writ of certiorari in this Court, making due reference to the case pending in the D.C. Circuit. It did neither. The ninety-day period was designed precisely to avoid the unduly prolonged litigation which would follow if the petitioner could extend certiorari time by awaiting the occurrence of an unpredictable and fortuitous date such as the issuance of mandate. *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 213 (1952); *Comm'r* v. *Estate of Bedford*, *supra*, 288 (1945).

### B. Petitioner Has Waived All Claims for Relief

Petitioner, until its present petition, has always recognized that it is not sufficient to urge that respondents have unlawfully received operating-subsidy, and that petitioner must also show that it has a claim for relief per-

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[5] The judgment below is to be contrasted with one in which the judgment itself does not become final *until* the occurrence of an event. The distinction is the traditional one between conditions subsequent and precedent. In the latter case, the period for seeking a writ of certiorari would commence only upon the happening of the specified event, when the judgment first becomes "final." *See Zimmern* v. *United States*, 298 U.S. 167, 169 (1936).

mitting its recovery against respondents because of that alleged illegality. Petitioner, indeed, started out with four bases for its recovery. It abandoned § 1 of the Sherman Act when it amended its complaint. Its claims under the Shipping Act, 1916, were pressed only as to § 16 in the District Court and no appeal was taken from the adverse decision on § 16. The Court of Appeals, as well as the District Court, ruled against petitioner on its two remaining theories, that recovery could be based on § 810 of the Merchant Marine Act or § 2 of the Sherman Act [Pet. A-10-14]. Petitioner does not seek certiorari in respect of either of these rulings and must, therefore, be deemed to have accepted them.[6] It follows that it has now stripped itself of all grounds for its own recovery even if its argument were accepted that subsidy was unlawfully paid to respondents.

### C. No Ground For Certiorari Is Shown

1. Petitioner does not claim that there is any conflict of lower court decision. There is, instead, a striking unanimity of decision. Two courts of appeals decisions, two district court decisions, and two agency decisions have each rejected, without a dissenting vote, petitioner's contentions. *Opinion of Controller General*, Op. B-159245, SRR 10,264 (1966); *Fact-Finding Hearing—Payment of Subsidy for Carriage of Preference Cargoes*, 13 SRR 44 (MSB, 1972); *Columbia SS Corp.* v. *American Mail Line*, Civ. No. 71-132 (D. Ore., unreported opinion of Chief Judge Solomon, Sept. 6, 1972, Pet. A 17-21); *Columbia SS Corp.* v. *American Mail Line*, 510 F.2d 29 (CA 9, 1975, Pet. A1-14); *American Maritime Association* v. *Peterson*, Civ. No. 1576-72 (D. D.C., unreported opinion of Judge Aubrey Robinson, Feb. 7, 1974); *States*

[6] Petitioner lists § 2 of the Sherman Act and § 810 of the Merchant Marine Act among the "statutes involved" [Pet. 3-4] and in its Appendix B [Pet. A-22-23] but does not include any claim for recovery thereunder either in its "Questions Presented" [Pet. 2] or in its "Reasons for Allowing the Writ" [Pet. 7-13].

*Marine International* v. *Peterson*, 518 F.2d 1070 (CADC, 1975), certiorari denied, No. 75-800, Feb. 23, 1976.

2. Petitioner advances no claim that the decision below is in conflict with any decision of this Court, nor that any major question of general applicability, whether of substance or of procedure, has erroneously been decided.

3. Substantially the same question was presented in *American Maritime Association* v. *Richardson*, No. 75-800, certiorari denied, Feb. 23, 1976.

**D. The Merits**

We believe petitioner's argument may fairly be summarized as follows: (a) U.S.-flag vessels need Government assistance [Pet. 8]. (b) Government preference cargo is one such form of assistance [Pet. 8-9]. (c) In 1936 Congress enacted another form—subsidy to meet the lower costs of foreign competitors [Pet. 9-10]. If there were no foreign competition, as in the domestic trades, there was no occasion for this subsidy[7] [Pet. 10-11]. (d) The decision of the Court of Appeals, allowing subsidy to be paid even though preference cargo is carried, frustrates the Congressional purpose, is "devastating" to the unsubsidized carrier, supplies a compulsion for all carriers to seek operating-subsidy and must therefore increase Government costs [Pet. 11-13]. These undocumented speculations, each of which we deny, can hardly admit of responsible discussion in complete separation from the underlying facts as to the American merchant marine, none of which is in this record.

In truth, there does not seem room for reasonable doubt that the Congress intended operating-subsidy to be paid even though preference cargo was carried. Specifically:

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[7] "Senator Crowley" upon whom petitioner twice relies [Pet. 10-12] was in truth a Mr. Crowley, Solicitor of the Post Office Department. The Black report, condemning the *1928* Act as a "murderous economic weapon" has no bearing on the 1936 Act [Pet. 11].

1. *The 1936 Act.* (a) The Merchant Marine Act, 1936, in six passages in §§ 601-603 [Pet. A-24-28] defines the necessity that subsidy be designed to meet foreign-flag competition. In every instance it speaks of "vessels" or "service, route or line," and never of particular cargoes.

(b) The principal cargo preference statutes—for military and Government-financed cargoes—antedated the 1936 Act.[8] That Act itself established three types of U.S.-flag preference. §§ 212(d), 405, 901(a), 46 U.S.C. §§ 1122(d), 1145, 1241(a). Yet there is not a word in the 1936 Act or in its history to suggest that the vessels subsidized under that Act could not carry these preference cargoes, or would be subject to subsidy abatement if they were carried.

2. *The Cargo Preference Legislation.* Throughout the 1948-1954 period of individually enacted preference provisions in connection with foreign relief legislation[9] the Congress explicitly recognized that the subsidized lines would share in the carriage of the preference cargo. As the House Merchant Marine & Fisheries Committee concluded after 1955 oversight hearings:[10]

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[8] These are quoted at Pet. A-32-33. It should, however, be noted that the military cargo preference law, 10 U.S.C. § 2631, was enacted April 28, 1904, not [as given Pet. A-33] on Aug. 10, 1956.

[9] Economic Cooperation Act, 62 Stat. 143; Amendments to E.C.A., 63 Stat. 50; Mutual Defense Assistance Act of 1949, 63 Stat. 714; Yugoslav Emergency Relief Assistance Act of 1950, 64 Stat. 1122; India Emergency Food Aid Act of 1951, 65 Stat. 69; Wheat for Pakistan Act of 1953, 67 Stat. 80; Famine Relief Act of 1953, 67 Stat. 476; Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454; Mutual Security Act of 1954, 68 Stat. 832.

[10] H. Rep. No. 1818, 84th Cong., 1st Sess., p. 2. Similar statements are found, e.g., at 94 Cong. Rec. 3737-38; H. Rep. No. 220, 81st Cong., 1st Sess., pp. 2-3; Chairman Bonner, in Hearings on H.R. 1340 before House Committee on Merchant Marine & Fisheries, 81st Cong., 2d Sess., p. 197; 99 Cong., Rec. 7091; 99 Cong. Rec. 10083; 100 Cong. Rec. 9340; 100 Cong. Rec. 9343.

> "* * * if a vessel sails with empty or half empty holds under circumstances where his foreign competitor would lose money, the American owner likewise loses notwithstanding the subsidy paid on his operating expenses. He must have cargo, in other words."

3. *The Long Administrative Construction.* (a) The Board from 1936 to the present day has never refused or reduced a subsidy voucher because of the carriage of preference cargo, and in at least 21 formal proceedings, reaching from 1949 to 1974, has recognized that subsidized lines were carrying military or civilian preference cargo. For one of these many examples, in *American President Lines, Ltd.*, 6 SRR 1031, 1041 (1966), the Board in considering an application for subsidy noted that "the needs of moving defense cargo are considered when determining how much vessel capacity is needed for the trade * * *."

(b) The Comptroller General in Op. B-159245, SRR 10,264 (1966) followed much the line of reasoning indicated above and concluded—

> "* * * this legislative background and the long-established administrative practice must be considered as establishing that operating-differential subsidy is payable, without reduction, even though a part of the cargo carried on particular voyage is military cargo which is reserved for U.S.-flag vessels."

## CONCLUSION

The petition is without merit and should be denied.

Respectfully submitted,

SHEA & GARDNER

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Warner W. Gardner
734 Fifteenth Street, N.W.
Washington, D. C. 20005

MILLER, ANDERSON, NASH, YERKE & WIENER
Fredric A. Yerke
900 S. W. Fifth Avenue
Portland, Oregon 97204

*Attorneys for Respondents American Mail Line, Ltd., and American President Lines, Ltd.*

BLACK, HELTERLINE, BECK & RAPPLEYEA
Guy J. Rappleyea
1200 Bank of California Tower
Portland, Oregon 97205

*Attorneys for Respondent States Steamship Company*

LINDSAY, NAHSTOLL, HART, DUNCAN, DAFOE & KRAUSE
Dennis J. Lindsay
1331 S. W. Broadway
Portland, Oregon 97204

DORR, COOPER & HAYS
John Hays
260 California Street
San Francisco, California 94111

*Attorneys for Respondent Pacific Far East Line, Inc.*

MCMURRY & NICHOLS
Garry P. McMurry
700 Blue Cross Building
Portland, Oregon 97201

ARNOLD & PORTER
Stuart J. Land
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

*Attorneys for Respondent Lykes Bros. Steamship Co., Inc.*

WOOD, WOOD, TATUM, MOSSER & BROOKE
Erskine B. Wood
1500 Standard Plaza
Portland, Oregon 97204

*Attorneys for Respondent American Export Isbrandtsen Lines, Inc.*

## CERTIFICATE OF SERVICE

February 27, 1976

I hereby certify that in compliance with Rule 33 of this Court I have this day served three copies of the foregoing brief in opposition by first class mail, postage prepaid, upon Souther, Spaulding, Kinsey, Williamson & Schwabe, 1200 Standard Plaza, Portland, Oregon 97204.

Warner W. Gardner

BLEED THROUGH